Supreme Court, U.S.
FILED
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NO.

In the

Supreme Court of the United States

OCTOBER TERM, 1993

ROGER F. QUISENBERRY,

Petitioner,

v.

STELLY-HOVEN, INC.;
RPI MANAGEMENT CORPORATION;
LANDCO, INC.; AND
MILTON T. BAUER, CLERK OF THE
CIRCUIT COURT OF PALM BEACH
COUNTY, FLORIDA,

Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

James K. Green
JAMES K. GREEN, P.A.
One Clearlake Centre
Suite 1503
250 Australian Ave. South
West Palm Beach, FL 33401
(407) 659-2029
Fla. Bar No. 229466
Attorney for Petitioner

6 copies

## QUESTION PRESENTED

1. Does due process require that certified mail notice of a tax sale be sent to a property owner's residence where the property subject to the tax sale is not the owner's residence and where the property owner's residence address is known or easily determined from public records?

## PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner, Roger F. Quisenberry, and respondents, STELLY-HOVEN, INC.; RPI MANAGEMENT CORPORATION; LANDCO, INC.; and MILTON T. BAUER, CLERK OF THE CIRCUIT COURT OF PALM BEACH COUNTY, FLORIDA. The same parties are before this Court.

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Roger F. Quisenberry respectfully petitions this Court to issue a writ of certiorari to review the decision of the Florida Supreme Court.

## OPINIONS BELOW

The denial of review and dismissal of appeal by the Florida Supreme Court is unreported and is reprinted in the Appendix hereto ["App."], at xxxii.

The affirmance of the trial court's decision to grant summary judgment in favor of defendants/respondents, by the Fourth District Court of Appeal for the State of Florida, is reported at 616 So. 2d 1232 (Fla. 4th DCA 1993). The unpublished Order of the Circuit Court granting summary judgment in favor of defendants/respondents is reprinted in App. at xxii.

Mr. Quisenberry timely filed this Petition for Writ of Certiorari in the United States Supreme Court.

## JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT:

> No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT: (DUE PROCESS) § 1:

> No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

This case implicates Fla. Stat. 197.522, App. at ii, Fla. Stat. § 48.031 App. at v, and Fla. Admin. Code Rule 12D-13.062, App. at vi.

## STATEMENT OF THE CASE

This case presents the question of whether due process requires that certified mail notice of a tax sale be sent to a property owner's residence where the property subject to the tax sale is not the owner's residence and where the property owner's residence address is known or easily determined from public records.

Petitioner Roger F. Quisenberry owned numerous parcels of property in Palm Beach County, Florida. On one parcel, located on Western Way in Lantana, Florida

("Western Way"), he owed taxes for 1989. The local clerk's office sent tax notices by certified mail to the Western Way address and to a second address owned by Mr. Quisenberry, located at Conniston Road in West Palm Beach, Florida ("Conniston Road"). Mr. Quisenberry, however, resided at a different address, located on Flagler Drive in West Palm Beach, Florida ("residence"). App. at xi. The local process server knew that Mr. Quisenberry resided on Flagler Drive. App. at xi.

As a result of Mr. Quisenberry's failure to pay taxes on the Western Way property, the local clerk applied for a tax deed and sent a copy of that application by certified mail, return receipt requested, to petitioner at the Western Way and Conniston Road addresses,

but not to him at his residence on Flagler Drive. The certified mail was never picked up. The application for a tax deed was also published. On December 18, 1992, a copy of the notice of the application was given by a Palm Beach County Sheriff's office process server to one of Mr. Quisenberry's employees, Mr. Osterby, who did not live at Mr. Quisenberry's residence but was only staying overnight.[1] App. at xii. The notice of the application was not posted at Mr. Quisenberry's residence but was posted at the Conniston Road property. App. at xi. The process server did not explain the

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[1] The return of service stated that individual service had been made upon Mr. Quisenberry, which was disputed by affidavits. The state courts, which reviewed this case on motion for summary judgment, accepted that personal service had not been made upon Petitioner.

contents of the notice to the employee.

Mr. Quisenberry was out of state visiting friends in Rhode Island App. at xii, and did not receive actual notice of the tax sale until after the sale, when a tenant on one of his properties so informed him. In fact, when Mr. Quisenberry paid his taxes in 1991 he had requested that the payments be first applied to his 1989 taxes which precipitated the tax sale.

Mr. Quisenberry raised this due process issue in his Memorandum In Opposition to Defendant's Motion for Summary Final Judgment, p. 7, wherein he cited this Court's opinion in Greene v. Lindsay, 456 U.S. 444 (1982). The Fourth District Court of Appeal, in affirming the summary judgment, relied on Dawson v.

Saada, 608 So. 2d 806 (Fla. 1992), which addressed the requirements of due process.

## HISTORY OF THE CASE

Mr. Quisenberry filed his complaint on February 12, 1992, in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. The trial court granted summary judgment in favor of defendants. App. at xxii. The Fourth District Court of Appeal affirmed. The Florida Supreme Court, on October 28, 1993, denied review and dismissed the appeal. App. at xxxii.

## REASONS FOR GRANTING THE PETITION

### I. THE NOTICE PROVIDED MR. QUISENBERRY BEFORE HIS PROPERTY WAS SOLD AT A TAX SALE WAS INADEQUATE AND VIOLATED DUE PROCESS

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), this Court reaffirmed some general principles of due process. One "[f]undamental requisite of due process of law is the opportunity to be heard." Id. at 314; Grannis v. Ordean, 234 U.S. 385, 394 (1914). Another cardinal rule of due process noted by this Court in Mullane is that

> [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314; Milliken v. Meyer, 311 U.S.

457 (1940); Grannis, 234 U.S. at 394.

This Court has emphasized on many occasions that the fundamental right to notice and an opportunity to be heard must be granted at "a meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party.

Id.

Since no notice was posted at or sent

to Mr. Quisenberry's residence before the tax sale, he had no actual knowledge of the tax sale until it was too late to protect his property interest. After the tax sale, Florida law vested the non-governmental respondents with a fee simple title to his property. Consequently, Mr. Quisenberry never had an opportunity to be heard before the state permanently deprived him of his property. Had he received adequate notice, he would have paid the taxes as demonstrated by the fact that after actually learning of the tax sale, he promptly sought counsel, attempted to pay the tax, and initiated the litigation from which this Petition arises.

The notice provided to Mr. Quisenberry resulted in a taking of

property without adequate notice and without compensation. It is fundamentally unfair and a clear violation of the law for Mr. Quisenberry to be deprived of property in such a manner. Cf. Lorretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

## II. IN BALANCING THE INTERESTS OF THE STATE WITH THE INTERESTS OF MR. QUISENBERRY, THE PROCEDURES CHOSEN BY FLORIDA TO SELL PROPERTY FOR DELINQUENT TAXES CANNOT BE UPHELD

In Mathews v. Eldridge, 424 U.S. 319 (1976), this Court formulated the test to be applied to determine whether certain procedures comport with due process:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that

> will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Using the Mathews approach, it is readily apparent that the notice provided to Mr. Quisenberry fails to withstand constitutional scrutiny.

### A. THE PRIVATE INTEREST AFFECTED BY STATE ACTION IS THE PERMANENT LOSS OF PROPERTY

The nature of the private interest at stake is Mr. Quisenberry's permanent loss of his property. A record title holder is assuredly an interested party if the real property he owns is scheduled to be sold

by the state because of delinquent property taxes. See Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983). A record title holder certainly has a significant property interest which could be affected by a tax sale. An owner's property interest is subject to constitutional protection.

### B. THE STATE INTEREST IN SELLING PROPERTY FOR DELINQUENT TAXES IS SOLELY TO COLLECT THE DELINQUENT TAX

The State of Florida has an important interest at stake in selling real property for delinquent taxes. In Florida, as in most other states, property taxes are a primary source of revenue necessary to fund state and local governmental services.

A state's power to collect taxes,

however, is not unbridled. In Marchetti v. United States, 390 U.S. 39 (1968), this Court recognized the power of government to tax, but also noted that the Constitution places limitations in connection with the exercise of those powers. Id. at 58. Indeed, it is this concern about abuses of tax power which led to the adoption of the Due Process Clause contained in the Fifth and Fourteenth Amendments. See Fuentes v. Shevin, 407 U.S. 67 (1972); Frank v. Maryland, 359 U.S. 360, 378 (1959); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977).

### C. THE PROCEDURES CHOSEN BY FLORIDA TO NOTIFY PROPERTY OWNERS OF A TAX SALE CREATE A SUBSTANTIAL RISK OF AN ERRONEOUS DEPRIVATION OF PROPERTY WHILE SUBSTITUTE SERVICE BY MAIL TO THE PROPERTY OWNER'S RESIDENCE OR BY POSTING WOULD REDUCE THE LIKELIHOOD OF ERROR

Florida's procedures for notice to property owners of tax sales were, under the circumstances, not reasonably calculated to inform property owners like Mr. Quisenberry, who owned numerous properties, of a tax sale. While Florida requires certified mail notice to property owners, it does not require that the notice be mailed to the property owner's residence, even where such residence is known or readily available to the clerk. Fla. Stat. § 197.522(1). Moreover,

Florida does not require that when certified mail notice is not actually retrieved by the property owner, that the property owner be personally served, Dawson v. Saada, 608 So. 2d. 806, 807 n.1 (1992). Further, Florida does not require that if the process server is unable to make service, that the notice be posted in a conspicuous place at the property owner's residence. Compare Fla. Admin. Code R. 12D-13.062(2)(b);[2] with Dawson,

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[2] Much of the argument in the state courts below discussed due process requirements of notice embodied in Section 197.522, Florida Statutes. Mr. Quisenberry acknowledges that the failure to follow state procedural requirements does not, ipso facto, establish a violation of federal due process. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). Mr. Quisenberry contends, however, that the failure to serve him personally, send notice by certified mail to his residence, or post notice at his residence violates federal due process.

608 So. 2d at 807 n.1.

**D. IT WOULD NOT HAVE BEEN DIFFICULT FOR THE CLERK TO HAVE ASCERTAINED THE NAME AND ADDRESS OF MR. QUISENBERRY AND IN ANY EVENT, THE PROCESS SERVER KNEW MR. QUISENBERRY AND WHERE HE LIVED**

Mr. Quisenberry's and homestead exemption title to his residence was a matter of public record and was even known to the process server. It would have then been a relatively simple matter to mail notice concerning the tax sale by certified mail to Mr. Quisenberry at his residence. In this case the process server left a copy of the notice with a non-relative employee at Mr. Quisenberry's home address without notifying the employee of its contents or legal significance. Unfortunately, Mr. Quisenberry never received the notice.

## III. NOTICE BY MAIL TO PROPERTY OWNERS' RESIDENTIAL ADDRESS IS AN INEXPENSIVE PROCEDURAL SAFEGUARD WHICH WOULD SUBSTANTIALLY REDUCE THE LIKELIHOOD OF AN ERRONEOUS SALE OF PROPERTY

Notice reasonably calculated to apprise property owners would more likely than not reduce the prospects that the State might mistakenly sell property for delinquent taxes. The interests of property owners and the State are identical with respect to the payment of property taxes. Each has a keen concern that the property owner not allow the taxes to become delinquent. In fact, the interests of the State are better served in mailing notice to a property owner at his residence. If a property owner received adequate notice at his residence he would more likely, at no expense to the

State, pay it immediately. This would result in substantial savings to the State in avoiding additional time and expenses which are incidental to any tax sale.

## IV. THE FLORIDA SUPREME COURT ERRED IN NOT FOLLOWING MULLANE AND OTHER PRECEDENT OF THIS COURT

The Florida Supreme Court failed to follow this Court's decision in Mullane and its progeny in not requiring posting at or mail notice to the property owner's residence. Dawson v. Saada, 608 So. 2d 806 (Fla. 1992).

In Mullane, this Court invalidated a New York statute which authorized notice by publication to beneficiaries of a common trust informing them about an annual judicial settlement of the common trust account. This Court held that with respect to known beneficiaries due process

required notice by mail, which this Court concluded was more reasonably calculated to give actual notice than notice by publication. This Court in Mullane stated the general rule that:

> Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability, notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Id. at 318. Nothing less should be required here. When, as here, the address of Mr. Quisenberry's residence was known or could have readily ascertainable by the clerk by a search of homestead exemptions and where the process server in fact knew where Mr. Quisenberry lived, the reasons disappear for means less likely than the

certified mail to Mr. Quisenberry's residence of a tax sale.

This Court has repeatedly reaffirmed this proposition. In Mennonite, this Court said "[n]otice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). Similarly, the notice provided in the instant case fails.

Based upon this Court's reasoning in Mullane and Mennonite, the Florida Supreme Court's decision in this case must be reversed. The magnitude of the

constitutional infirmity in this case is greater than in Mullane and Mennonite. In this case, lack of notice results in Mr. Quisenberry being permanently deprived of the property interest while in Mullane the question concerned only a review of how the trustee managed the common trust fund assets -- not necessarily the permanent loss of the principal.

This Court has subsequently applied the Mullane guidelines to strike down various statutes which did not provide for notice by mail to interested parties. What happened in this case offends the fundamental concepts of due process.

In another case, similar to this, this Court struck down a procedure which provided for giving notice to a mortgagee holding that the state must as a matter of

due process send notice by mail. Based upon the same reasoning and analysis, in the above cited cases, this Court should find the procedures used here were unconstitutional.

This Court in Greene v. Lindsey, 456 U.S. 444 (1982), reaffirmed those well entrenched due process principles articulated in Mullane. In Greene, this Court struck down the Kentucky Forcible Entry and Detainer Act holding that the posting of service of process by tacking it upon the door of a tenant's apartment was, under the circumstances, not reasonably calculated to apprise a tenant of an eviction action and hence was violative of due process. This Court citing Mullane suggested that service on a tenant by mail was an inexpensive

additional manner of service which would more likely result in the tenant receiving actual notice of the eviction proceedings.

Thus, based upon this Court's holding in Greene, this Court should find the Florida procedures unconstitutional as applied to Mr. Quisenberry because they fail to require adequate notice to inform property owners to of a tax sale.

**CONCLUSION**

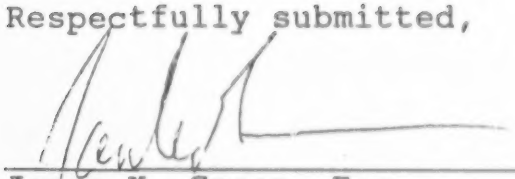
From the foregoing analysis, it is readily apparent that the notice procedures used in this case statutes violate Due Process. Thus this Court should reverse the decision of the Florida Supreme Court. This Court should further invalidate the tax sale to respondents with respect to the interests of Mr. Quisenberry and remand this case for

further proceedings, not inconsistent with this decision.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail, first-class, postage prepaid this 26th day of January, 1994 to Daniel M. Landis, Esq., Tedesco & Landis, Attorneys for Defendants/Respondents, 980 North Federal Highway, Suite 302, Boca Raton, Florida 33432; and Leigh Shinohara, Esq., Palm Beach County Courthouse, Clerk's Office, Room 206, 301 North Olive Avenue, West Palm Beach, Florida 33402.

Respectfully submitted,



James K. Green, Esq.
JAMES K. GREEN, P.A.
One Clearlake Centre
Suite 1503
250 Australian Ave. South
West Palm Beach, FL 33401
(407) 659-2029
Fla. Bar No. 229466

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Fla. Stat. 197.522 provides:

197.522. Notice to owner when application for tax deed is made

(1)(a) The clerk of the circuit court shall notify, by certified mail with return receipt requested or by registered mail if the notice is to be sent outside the continental United States, the persons listed in the tax collector's statement pursuant to s. 197.502(4) that an application for a tax deed has been made. Such notice shall be mailed at least 20 days prior to the date of sale. If no address is listed in the tax collector's statement, then no notice shall be required.

(b) The clerk shall enclose with every copy mailed a statement as follows:

WARNING: There are unpaid taxes on property which you own or in which you have a legal interest. The property will be sold at public auction on (date) unless the back taxes are paid. To make payment, or to receive further information, contact the clerk of court immediately at (address), (telephone number).

(c) The clerk shall complete and attach to the affidavit of the publisher a certificate containing the names and addresses of those persons notified and the date the notice was mailed. The certificate shall be signed by the clerk and his official seal affixed. The certificate shall be prima facie evidence of the fact that the notice was mailed. If no address is listed on the tax

collector's certification, the clerk shall execute a certificate to that effect.

(d) The failure of anyone to receive notice as provided herein shall not affect the validity of the tax deed issued pursuant to the notice.

(e) A printed copy of the notice as published in the newspaper, accompanied by the warning statement described in paragraph (b), shall be deemed sufficient notice.

(2) In addition to the notice provided in subsection (1), the sheriff of the county in which the legal titleholder resides shall, at least 20 days prior to the date of sale, notify the legal titleholder of record of the property on which the tax certificate is outstanding. The original notice and sufficient copies shall be prepared by the clerk and provided to the sheriff. Such notice shall be served as specified in chapter 48; if the sheriff is unable to make service, he shall post a copy of the notice in a conspicuous place at the legal titleholder's last known address. The inability of the sheriff to serve notice on the legal titleholder shall not affect the validity of the tax deed issued pursuant to the notice. A legal titleholder of record who resides outside the state may be notified by the clerk as provided in subsection (1). The notice shall be in substantially the following form:

WARNING

There are unpaid taxes on the property which you own. The property will be sold

at public auction on ... (date) ... unless the back taxes are paid. To make arrangements for payment, or to receive further information, contact the clerk of court at ... (address) ..., ... (telephone number) ....

In addition, if the legal titleholder does not reside in the county in which the property to be sold is located, a copy of such notice shall be posted in a conspicuous place on the property by the sheriff of the county in which the property is located. However, no posting of notice shall be required if the property to be sold is classified for assessment purposes, according to use classifications established by the department, as nonagricultural acreage or vacant land.

(3) Nothing in this chapter shall be construed to prevent the tax collector, or any other public official, in his discretion from giving additional notice in any form concerning tax certificates and tax sales beyond the minimum requirements of this chapter.

Fla. Stat. § 48.031(1) provides:

> (1) Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.

Fla. Admin. Code Rule 12D-13.062 provides:

Rule 12D-13.062 Notices; Advertising, Mailing, Delivering and Posting of Notice of Tax Deed Sale.

(1) Advertising.

(a) Upon receipt from the tax collector of the tax collector's certification and the tax deed application the clerk shall publish a notice of the pending sale once each week for four (4) consecutive weeks at weekly intervals in a local newspaper. The form of the notice shall be as prescribed by the Department of Revenue. No tax deed sale shall be held until 30 days after the first publication of notice.

(b) The clerk shall obtain proof of publication and file the same in his office before holding a tax deed sale. Proof of publication may be a copy of the advertisement showing the date the advertisement was published and copies of all four (4) advertisements. The four (4) advertisements shall not be clipped from the paper, but shall remain intact so that the date line of the paper is shown. Proof of advertisement may also be in the form of a publisher's affidavit with one copy of the advertisement attached.

(c) The form of the notice shall be substantially as follows:

Notice of Application for Tax Deed

NOTICE IS HEREBY GIVEN

That

The holder of the following certificates has filed said certificates for a tax deed to be issued thereon. The

certificate numbers and years of issuance, the description of the property, and the names in which it was assessed are as follows:

_____ Certificate No./Year of Issuance/Description of Property/Name in which assessed

All of said property being in the County of_____ , State of Florida.

Unless such certificate or certificates shall be redeemed according to law the property described in such certificate or certificates will be sold to the highest bidder at the courthouse door on the_____ day of_____ at_____ A.M.

Dated this_____ day of 19-.

Clerk of Circuit Court of_____ County, Florida Ad No._____

The notice shall be single column and the size of the print shall be the same as any other legal advertisement. The clerk of the court shall not consolidate legal advertisements of tax deed applications with different legal descriptions. A tax deed shall have only one (1) legal description included on the deed. Consolidated sales are prohibited. The clerk shall sell the land in each tax deed application separately.

(2) Delivering and Posting.

(a) At least 30 days prior to the date of sale, the clerk shall prepare a notice containing the warning required by Section 197.522(2), F.S., and:

1. If the owner of the property to be sold resides in the same county in which the property is located, deliver an original and sufficient copies of the

notice to the sheriff of that county and

2. If the owner resides in Florida outside the county where the land is located, deliver an original and sufficient copies of the notice to the sheriff of the county in which the property is located, unless the property is assessed as non-agricultural acreage or vacant land.

3. If the owner resides outside the State of Florida, the clerk shall send notice to the sheriff of the county where the property is located, unless the property is assessed as non-agricultural acreage or vacant land.

(b) At least 20 days prior to the date of sale, the sheriff of the county where the owner resides shall serve the notice received from the clerk in the manner specified in Chapter 48, and the sheriff of the county where the property is located shall post the notice in a conspicuous place on the property.

(3) Mailing. At least 20 days prior to the date of sell, the clerk shall mail notices, by certified mail, to all persons listed in the tax collector's certification. Such notices shall contain the warning required by Section 197.522(1)(b), F.S. When such warning, combined with a copy of the advertised notice, is sent, it shall be deemed sufficient notice.

(4) The clerk shall prepare a certificate containing the names and addresses of those persons notified by mail and the date of mailing. The certificate shall be attached to the

affidavit of publisher (proof of publication).

(5) The clerk of the circuit court shall record his certificate of notice together with the affidavit of publisher (proof of publication) in the official records of the county. For the recording of the certificate of notice and affidavit of publisher the clerk shall receive such fees for recordation as specified in Chapter 28, Florida Statutes.

x

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. CL 92-1675 AG

ROGER F. QUISENBERRY,

Plaintiff,

vs.

STELLY-HOVEN, INC., et al.,

Defendant.
_____/

**ORDER ON MOTION FOR SUMMARY FINAL JUDGMENT**

THIS CAUSE came on to be heard on Defendants' Motion on Summary Judgment as to Plaintiffs complaint and as to Defendant STELLY-HOVEN, INC., RPI MANAGEMENT CORPORATION and LANDCO, INC.'s Motion for Summary Judgment and its claim to quiet title.

The Defendants purchased a tax deed at a sale conducted by the Clerk's office

for $50,000.00. Plaintiff was the owner of the property. The facts are rather complicated however, the real disagreement between the parties concerns the interpretation of a portion of Fla. Stat. 197.522(2). The clerk complied with all statutory requirements, mailed the appropriate notices and the sheriff posted a notice at an address of property owned by Quisenberry but not where he lived. This property is the Connisten Road property. The process server knew the Plaintiff and knew he lived at a residence on Flagler Drive. At this point the parties have different versions of the facts. Plaintiff's version which we will adopt for purposes of this Order is that the officer delivered the notice to his residence on Flagler while he was out of

town. The officer left the notice with a person who is described as a handyman/house sitter/long time friend. The officer did not explain the contents of the notice to the house sitter. The house sitter placed the notice on Plaintiffs desk where he placed all mail during Plaintiffs absence.

Plaintiff agrees that since the Sheriff was unable to effectuate service as specified in Chapter 48 the sheriff was required to post a copy of the notice in a conspicuous place at his last known address. Since the process server knew Plaintiff lived at the Flagler address the posting at the Connisten Road address was ineffectual and (continues Plaintiff) leaving the process with the handyman/house sitter is not posting.

Posting, Plaintiff asserts is affixing to the front door. The Court concludes the Plaintiff is incorrect.

The Court concludes that the delivery of the notice to Plaintiffs residence in the manner described herein is sufficient.

Wherefore, it is ADJUDGED that the motion is granted. Defendants are directed to provide a judgment consistent with this Order.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 11th day of May, 1992.

/s/ Stephen A. Rapp
Stephen A. Rapp, Circuit Judge

Copies furnished:

J. Timothy Horkan, Esq.
Suite 1002, Crocker Plaza
5355 Town Center Road
Boca Raton, FL 33486

Leigh Shinohara, Esq.
Palm Beach Courthouse

301 N. Olive Avenue
West Palm Beach, FL 33402

**AFFIDAVIT**

STATE OF FLORIDA )

COUNTY OF PALM BEACH )

BEFORE ME, the undersigned authority, personally appeared Roger F. Quisenberry who, being by me first duly cautioned and sworn upon his oath, deposes and says:

1. I am over the age of 18 years and reside in Palm Beach County, Florida.

2. This affidavit is given in connection with the litigation entitled Quisenberry v. Stelly-Hoven, Inc., et al, Case Number CL 92-1675-AG, In the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

3. Prior to January 15, 1992, I was the record title owner to the following described land located in Palm Beach County, Florida (the "Property"):

Lot 2, Block 4 of Palm Beach Ranches (unrecorded), street address 6022 Western Way, Lantana, Florida

4. My ownership of the Property is based on the warranty deed dated November 10, 1971, recorded at O.R. Book 1950, Page 1139 of the Public Records of Palm Beach County, Florida.

5. In 1991, a personal friend of mine (Rosemaries Meggiacomo of Cranston, Rhode Island) visited her condo in Florida. Because health problems prevented her from driving her car back to Rhode Island, I agreed to do on my next opportunity.

6. Around noon on December 16, 1991, I left West Palm Beach in Ms. Meggiacomo's car enroute to Rhode Island. I arrived at Ms. Meggiacomo's house in Rhode Island around 4:00 p.m. on December

18, 1991.

7. Because I was experiencing problems with recent bridgework in my mouth, on December 19, 1991, I arranged to see Dr. Frank Tirocchi, a dentist in Providence, Rhode Island. I continued my visit with Ms. Meggiacomo until December 21st. In order to return to Florida, I caught a Bonanza bus at approximately 1:00 p.m. in Providence, Rhode Island. That bus arrived at New York City Port Authority at approximately 3:30 p.m. There, I caught a Greyhound bus that departed around 4:30 p.m. and arrived in West Palm Beach around late afternoon of December 22nd. I then called Joe Osterby who picked me up at the station.

8. I never received notice that my property was being sold for unpaid taxes

until after the fact on January 16, 1992 when a tenant on one of the properties informed me.

9. The 1988 tax certificate that was foreclosed upon in this case was for taxes that were assessed in 1984 which, because of litigation, did not become due until approximately 1988. Quisenberry v. Walker, et al., Case Number CL 85-328-CA, In the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Although I believe that those taxes were paid as part of the settlement of litigation, I have yet to find documentary proof. At any rate, I paid taxes on the property for the 1985, 1986, 1987, 1988, and 1990 assessments. The 1991 taxes are being withheld pending this litigation. The 1992 taxes are not

yet due.

10. When I forwarded my payment for 1990 taxes to the Palm Beach County Tax Collector, I enclosed a letter requesting that the funds be applied to any balance on prior years' taxes. I assumed this was done, and did not hear otherwise. Had the tax collector heeded my request, this case would not have arisen. Attached is a copy of my May 30, 1991 letter to the Tax Collector.

11. Promptly after hearing that a tax deed had been issued on my property, I engaged Bond, Schoeneck & King to help me clear title. I also tendered the amount of taxes claimed by the Tax Collector to be due under, but neither the Clerk nor the Recording Office would accept the tender.

xx

FURTHER AFFIANT SAYETH NOT.

/s/ Roger F. Quisenberry
ROGER F. QUISENBERRY

THE FOREGOING INSTRUMENT was acknowledged before me this 17th day of April, 1992 by Roger F. Quisenberry, who is personally known to me or who has produced a Florida driver's license as identification and who did/did not take an oath.

/s/ Elizabeth T. Crittenden
Notary Public Cert. No. CC096649
My Commission Expires:

Elizabeth T. Crittenden
My commission expires
April 7, 1995
Bonded thru Notary Public Underwriters

R. Quisenberry
5421 S. Flagler Drive
West Palm Beach, FL 33405

[Handwritten] [Dated May 30, '91]

Allen C. Clark, Tax Collector
Box 1
W.P.B. Fla. 33401

Re: 1990 Taxes

Gentlemen:

Here's cashier's checks for 10 pieces of property. The cert. checks are for current amounts due, "coupons" attached.

However; where I owe a prior year's taxes mainly '89's and I don't know the exact amount because of interest, late fees, penalties, etc.) Please apply to the "older" taxes (I.E. '89) and apply any "overage" to current 1990 taxes. If there is not enough to cover (taxes seem to go up every year tho, so I'm assuming it will cover) please advise post haste and I'll either bring the difference down in person or mail back same day.

Please advise if any problems or questions.

Yours,

/s/Roger Quisenberry

JUN-02-1992 09:44AM 92-168043

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

ORB 7265 PG 1336
CASE NO. CL 92-1675 AG

ROGER F. QUISENBERRY,

Plaintiff,

vs.

STELLY-HOVEN, INC.,
RPI MANAGEMENT CORPORATION,
etc., et al.,

Defendant.
_____/

**SUMMARY FINAL JUDGMENT**

THIS CAUSE having come on to be heard on the 7th day of May, 1992 on the Motion for Summary Final Judgment filed on behalf of the DEFENDANTS, STELLY-HOVEN, INC. RPI MANAGEMENT CORPORATION, LANDCO, INC. (hereinafter collectively referred to as "DEFENDANTS"), and with reference to the

Complaint and Counterclaim filed in these proceedings and against PLAINTIFF, ROGER F. QUISENBERRY (hereinafter referred to as "QUISENBERRY"), and the Court having reviewed the Motion filed together with the supporting Affidavits, supporting Memorandum of Law and opposing Affidavit and after hearing the arguments of the parties present, the Court having considered the arguments presented, the Court file and such other, different and related matters as deemed appropriate, it is hereby determined as follows:

FINDINGS OF FACT

1. On January 15, 1992 a Tax Deed Sale was conducted in Palm Beach County with reference to the following described real property:

> The West-Half (W1/2) of the Southeast-Quarter (SE1/4) of the

Southeast-Quarter (SE1/4) of the Northeast Quarter (NE1/4) of Section 10, Township 45 South, Range 42 East, Public Records of Palm Beach County, Florida.

**ORB 7265 Pg 1337**

Also known as Lot 2, Block 4, PALM BEACH RANCHES, (unrecorded).

The above-described real property shall hereinafter be referred to as "Property".

2. That the DEFENDANTS were the successful bidders for said property and in consideration of the bid amount of $50,900.00, the PALM BEACH COUNTY CLERK's OFFICE delivered to DEFENDANTS the Tax Deed dated January 15, 1992, which constitutes the subject matter of these proceedings. A photocopy of said Tax Deed is attached to DEFENDANTS' Motion for Summary Final Judgment, marked as Exhibit "A" and incorporated herein as if more

fully set forth at this point.

3. That QUISENBERRY was the former record title holder to the Property and filed a verified Complaint seeking to set aside the Tax Deed and requesting Emergency Injunctive Relief as to his personal property located on the subject real property.

4. That DEFENDANTS hereby voluntarily dismiss Count II of their Counterclaim seeking relief for slander of title.

5. That the findings set forth in the Court's Order dated May 11, 1992, are incorporated herein.

Based on the foregoing, it is

1. That DEFENDANTS own fee simple and are entitled to quiet and peaceful possession of the Property (more

specifically described in Paragraph 1 above) and that QUISENBERRY and each and all persons claiming by, through or under QUISENBERRY, shall no longer have any claim, estate, right, lien or interest in and to the property or any part thereof.

2. That QUISENBERRY is hereby enjoined and any party claiming by, through or under QUISENBERRY is hereby enjoined from asserting any adverse claim to DEFENDANTS' title with respect to said property.

**ORB 7265 Pg 1338**

3. That Judgment is entered for DEFENDANTS with reference to Count I and Count II of QUISENBERRY's Complaint and no relief is available to QUISENBERRY thereon.

4. That QUISENBERRY is hereby

permitted ten (10) days from the date of this Order in which to arrange with DEFENDANTS that removal of his personal property. In the event QUISENBERRY fails to remove his personal property within the ten (10) day time period, DEFENDANTS may dispose of any personal property remaining on the subject real Property in any manner they see fit with no obligation or responsibility to QUISENBERRY.

5. That Judgment is granted in favor of DEFENDANTS as to Count I of their Counterclaim quieting title to the Property in favor of DEFENDANTS pursuant to their Tax Deed in accordance with Florida Statute § 65.081.

6. The DEFENDANTS voluntarily dismiss Count II of their Counterclaim.

7. Judgment is granted in favor of

DEFENDANTS as to Count I and Count II of QUISENBERRY's Complaint.

8. That jurisdiction of this action is retained to enter such further Orders as may be just and proper including, without limitation, Writs of Possession. The Clerk, at the request of DEFENDANTS, shall issue a Writ of Possession for the Property to accomplish possession upon further Order of this Court.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 24th day of May, 1992.

/s/ Stephen A. Rapp
Stephen A. Rapp, Circuit Judge

Copies furnished:

Daniel M. Landis, Esq.
Compson Financial Center, Ste. 302
980 N. Federal Hwy.
Boca Raton, FL 33432

J. Timothy Horkan, Esq.

Suite 1002, Crocker Plaza
5355 Town Center Rd.
Boca Raton, FL 33486

Leigh Shinohara, Esq.
301 N. Olive Ave.
West Palm Beach, FL 33402

**RECORD VERIFIED**
**PALM BEACH COUNTY, FLA.**
**CLERK CIRCUIT COURT**

xxx

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JANUARY TERM 1993

L.T. CASE NO. 92-1905

| | |
|---|---|
| ROGER F. QUISENBERRY,<br><br>Appellant,<br><br>v.<br>STELLY-HOVEN, INC., AG et al.,<br><br>Appellees. | NO. 92-1675 |

Opinion filed May 5, 1993

**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.**

Appeal from the Circuit Court for Palm Beach County; Stephen A. Rapp, Judge.

Richard H. Levenstein of Bond, Schoeneck & King, Boca Raton, for appellant.

Daniel M. Landis of Tedesco & Landis, P.A., Boca Raton, for appellees.

PER CURIAM.

AFFIRMED. See Dawson v. Saada, 608 So. 2d 806 (Fla. 1992).

GLICKSTEIN, C.J., WARNER and FARMER, JJ., concur.

**SUPREME COURT OF FLORIDA**

THURSDAY, OCTOBER 28, 1993

CASE NO. 82,112

District Court of Appeal,
4th District - No. 92-1905

ROGER F. QUISENBERRY,

Petitioner/Appellant,

v.

STELLY-HOVEN, INC., ET AL.,

Respondents/Appellees.

**********

This case having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the appeal is dismissed and the petition

for review is denied.

OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy BH

**[OFFICIAL SEAL OF THE SUPREME COURT OF THE STATE OF FLORIDA]**

cc: Marilyn N. Beuttenmuller, Clerk
Dorothy Wilken, Clerk
Hon. Stephen A. Rapp, Judge
Hon. Richard H. Levenstein
Mr. Daniel M. Landis
Ms. Leigh Shinohara

/s/Sid J. White
Sid J. White
Clerk, Supreme Court